Decision **REVISED PROPOSED DECISION OF ALJ BEMESDERFER**
(Mailed 4/23/2013)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Pablo Bay Pipeline Company LLC for Approval of Tariffs for the San Joaquin Valley Crude Oil Pipeline.	Application 08-09-024 (Filed September 30, 2008)
And Related Matters.	Case 08-03-021 Case 09-02-007 Case 09-03-027

(See Appendix A for List of Appearances)

DECISION ORDERING REFUNDS OF OVERCHARGES

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DECISION ORDERING REFUNDS OF OVERCHARGES

1 Summary

This decision (a) orders San Pablo Bay Pipeline Company (SPBPC), successor to Equilon Enterprises LLC (Equilon), and Shell Trading (US) Company (STUSCO) (collectively, Shell)[1] to refund to Chevron Products Company, Tesoro Refining and Marketing Company, and Valero Marketing and Supply Company (collectively, Independent Shippers) the sum of $104,291,585, allocated among Independent Shippers in the amounts determined herein; (b) tolls the statute of limitations for the Independent Shippers' refund claims; and (c) establishes April 1, 2005, as the first date of the refund period for all shippers on the pipeline.

This proceeding is closed.

[1] In 2005, when the first complaint in these consolidated proceedings was filed, the pipeline was operated by Equilon. Independent Shippers who wished to ship crude oil on the pipeline had to "sell" their oil to STUSCO at gathering points in the central valley and simultaneously "buy" at a higher price an equivalent quantity of crude oil from STUSCO at delivery points in the San Francisco Bay Area. STUSCO delivered the purchased oil to Equilon in the central valley for shipping to the Bay Area, with the effect that Equilon was at all times transporting oil nominally owned by a sister entity, both of which were ultimate subsidiaries of Royal Dutch Shell PLC, a publicly-traded corporation not subject to Commission jurisdiction. In 2008, the pipeline's assets were acquired by SPBPC which simultaneously filed an application for Commission approval of transportation rates. For ease of reference and to avoid cluttering this decision with multiple names and acronyms, the pipeline-operating-entity is referred to as Equilon or Shell for the period prior to the creation of SPBPC and as SPBPC thereafter.

2 Background

2.1 Procedural History before Rehearing

The refunds at issue result from the Complaints filed by Chevron Products Company (Chevron), Tesoro Refining and Marketing Company (Tesoro) and Valero Marketing and Supply Company (Valero) (collectively, Independent Shippers) against Shell. The Independent Shippers alleged that Shell unlawfully overcharged for oil transportation services over its 265-mile-long heated oil pipeline (Pipeline), and practiced discrimination against its unaffiliated customers, from April 1, 2005 through June 30, 2011, the effective date of the Commission-approved tariff for San Pablo Bay Pipeline Company (SPBPC), which is the successor to Shell. The complaints for refunds have gone through two sets of proceedings, the first beginning almost eight years ago, in 2005, and the second in 2008.

Chevron's initial Complaint (C.) 05-12-004, was filed on December 5, 2005. The complaint alleged, *inter alia*, that the buy/sell trading contracts Shell entered into for transportation of oil over the Pipeline were a subterfuge to evade Commission jurisdiction; that from times prior to 2005, the Pipeline was being operated as a public utility; that the Shell Entities overcharged all non-affiliated Independent Shippers for services from at least April 1, 2005 and discriminated between their affiliates and non-affiliates, all in violation of Public Utilities Code Sections 451, 453, 455.3, 461.5, 486(a), 493(a), 494(a) and General Order (GO) 96-A.[2] The complaint made many references to Tesoro and Valero as the other Independent Shippers that constituted a "portion of the public" to whom

[2] All subsequent section references are to the Public Utilities Code, unless otherwise noted.

Shell provided public utility oil transportation services during the relevant period.

One week later, on December 13, 2005, Tesoro filed a petition to intervene as a party to that complaint proceeding, stating that it used the pipeline at issue in the proceeding, and that the factual base of Chevron's complaint applied equally to Tesoro. Tesoro adopted the Chevron complaint's allegations as its own and sought the same relief. The volumes of oil at issue were those sold by Chevron to Tesoro that were required by Shell to be transported through the allegedly sham buy/sell agreements. Shell did not oppose that motion, which was granted on January 17, 2006.

On March 21, 2006, a Prehearing Conference in C.05-12-004 was held. At that conference, the parties encouraged the Administrative Law Judge (ALJ) to bifurcate the case into two phases: first, to determine in C.05-12-004 if the Pipeline is or is not a public utility; second, if the Pipeline is deemed a public utility, to thereafter consider the refund claims in a future "ratesetting" proceeding. In their Answer to Chevron's 2005 Complaint, Equilon Enterprises LLC (Equilon) and Shell Trading (US) Company (STUSCO) had previously stated that they "agree that the issues in this proceeding should be bifurcated as suggested by Chevron and that a schedule for the second phase, if required, should be established after a final decision has been issued with respect to the first phase."[3]

[3] *See* Answer of Equilon Enterprises LLC, Doing Business as Shell Oil Products US, and Shell Trading (US) Company to Complaint of Chevron Products Company, filed February 16, 2006, at 9.

All parties referred to the Phase 2 proceeding as a "ratesetting proceeding" and understood, by their various statements of record, that there were two elements to this ruling: one, that we would halt consideration of the refund claims, but intended to reconsider them in a second phase, if we concluded that the Pipeline was a public utility; and two, that the use of the term "ratesetting" in this instance included consideration of the refund claims.[4] For example, Chevron's counsel stated that "[i]n our view, the way you have proposed bifurcating the issues, Phase 2, while partly related to the Complaint—because the backward-looking portion of the ratesetting definitely relates to the Complaint—the forward looking portion is more in the nature of a ratesetting."[5] ALJ Walker also stated that "discovery regarding the ratemaking issues and competitive ratemaking should await Phase 2, if there is a Phase 2. It seems to me Phase 1 … discovery should be devoted exclusively to the issue of whether there is or is not a public pipeline."[6]

On March 28, 2006, a Scoping Memo and Ruling of Assigned Commissioner was issued that reflected the discussion at the Prehearing Conference, namely, that Phase 1 would only concern questions of jurisdiction. We did not include the refund issues in that ruling as they were now beyond the scope of Phase 1. We will refer to this ruling as the "bifurcation ruling."

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[4] Reporters Transcript (RT): Prehearing Conference (PHC) at 5, 6, 12, 15-16, in C.05-12-004.

[5] *Id.* at 15-16.

[6] *Id.* at 2.

Our decision in C.05-12-004, Decision (D.) 07-07-040, issued on July 27, 2007, as modified by D.07-12-021, issued on December 6, 2007, determined that the Pipeline had provided public utility service since 1996, was dedicated to public use, and therefore was subject to our jurisdiction, and we ordered Shell to file tariffs for its third party contracts. We ruled that the buy/sell agreements were a subterfuge to conceal the actual business of transporting oil for third parties. We also found that "through its monopoly control of [the pipeline] . . . Shell Oil is in a position to damage its competitors by denying them access to the pipeline or charging them an exorbitant price to use it." (D.07-07-040 at 21.) Shell challenged those decisions unsuccessfully in the California Court of Appeal and the California Supreme Court. The Supreme Court denied the petition for review on August 20, 2008, thereby finally resolving the public utility issue.[7] Accordingly, the law of this case is that this Commission has had jurisdiction to regulate the Pipeline's public utility services as early as 1996.

On March 26, 2008, Chevron filed C.08-03-021. This second complaint made the same allegations as were made in C.05-12-004. In Shell's Answer to that complaint, filed May 9, 2008, it acknowledged, among other things, that Chevron's second complaint repeated verbatim five of the six material allegations raised in the first complaint. We find this acknowledgement is an

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[7] *See Equilon Enterprises LLC et al. v. Public Utilities Commission of the State of California*, California Court of Appeal, Second Appellate District, Division Five, Case No. B203949 – Order denying petition for writ of review (June 26, 2008); *Equilon Enterprises LLC et al. v. Public Utilities Commission of the State of California*, California Supreme Court, Case No. S164909 – Order denying petition for review (August 20, 2008) [2008 Cal. Lexis 10214].

admission that Shell was put on notice of the following alleged violations of the Public Utilities Code as of December 2005: violations of Sections 486(a), 493(a) and 494(a); discrimination in rates between their affiliate and Independent Shippers on the pipeline in violation of Sections 453 and 461.5; violation of GO 96-A; and violations of Section 451, by charging unreasonable rates when Shell changed the pricing under its buy/sell contracts with third parties from April 1, 2005.[8]

On September 30, 2008, one month after the Supreme Court denied Shell's petition for review, and after several extensions of time, SPBPC finally followed our Order by filing its Application in this proceeding for approval of tariffs for the Pipeline. SPBPC requested "market-based" rates instead of traditional cost-of-service rates.

On February 13, 2009, Chevron and SPBPC filed a joint motion to consolidate the Chevron 2008 complaint, C.08-03-021, into SPBPC's existing ratesetting proceeding, Application (A.) 08-09-024. In the joint motion to consolidate, the parties stated: "If the Commission accepts the Amended Complaint, the issues will therefore be (a) whether the rates Defendants charged from April 1, 2005 until the effective date of their approved tariff were unjust and unreasonable, and (b) if so the amount of any refund Defendants should pay shippers. A.08-09-024, on the other hand, will determine the just and reasonable rates for transportation of crude oil on the Shell Pipeline pursuant to its filed tariff. While the just and reasonable rate for the past period may very well be

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[8] *See* Answer of Equilon Enterprises LLC, Doing Business as Shell Oil Products US, and Shell Trading (US) Company to Complaint of Chevron Products Company at 2-3 (filed May 9, 2008).

different from the just and reasonable tariff rate, the cases will raise similar legal issues and much of the same evidence.… The interests of judicial economy and a consistent resolution to both proceedings are thus served by hearing these cases together. For these reasons, granting the instant motion is in the interest of justice and conservation of resources, and does not prejudice any party in these proceedings."[9] (Emphasis added.) This reflected what we originally intended. Rule 7.4 of the Commission's Rules of Practice and Procedure (Rules), Cal. Code Regs., tit. 20, 7.4, treat consolidation as a procedural vehicle for resolving proceedings involving related questions of law and fact.

On February 13, 2009, the same day as the joint motion, Tesoro filed C.09-02-007, its second complaint in which it again alleged that since at least April 1, 2005, defendants had violated Public Utilities Code Sections 451, 453, 455.3, 461.5, 486(a), 493(a), 494(a) and GO 96-A. On March 5, 2009, Tesoro filed an amended complaint.

On March 16, 2009, the Commission issued an "Order Extending Statutory Deadline" in C.08-03-021, Chevron's complaint case. In that Order, the Commission stated in part: "A prehearing conference (PHC) in the rate case was held on February 19, 2009. At the PHC, the ALJ indicated his intention to consolidate this case with the rate case and other complaint cases arising out of the Commission's decision in D.07-07-040. At issue in the consolidated proceeding is the question of what are reasonable rates for shipping oil on the Pipeline. While the parties and the ALJ recognize that tariffed rates to be charged in the future cannot be applied without modification to past operations

[9] February 13, 2009 Joint Motion to Consolidate Proceedings at 1-2.

of the pipeline, *all are in agreement that evidence presented in the rate case will be essential to determining past reasonable rates and the amounts of refunds, if any, to which shippers are entitled*." (Emphasis added.) We have good cause to believe that this was SPBPC's predecessors' position in 2005 as well.

Valero and its predecessors had transported crude oil on the Pipeline under similar buy/sell agreements with SPBPC's affiliate, STUSCO, since at least April 1, 2005. On December 20, 2006, before Valero filed a complaint on the same grounds as the other Independent Shippers, Shell modified its buy/sell agreement with Valero to include a new "non-dedication/termination" clause, Paragraph C.20, that stated in part: "[I]f Valero files or participates in any regulatory proceeding, litigation, trial, arbitration, or other proceeding of any kind in which Valero advocates that STUSCO or any of its affiliates are subject to federal or state regulation as a public utility or other common carrier . . . STUSCO May terminate this Agreement immediately upon written notice to Valero. Any such termination by STUSCO shall be treated as a termination for default by Valero."[10]

On March 23, 2009, Valero filed a complaint in C.09-03-027 in which it made fundamentally the same allegations as Chevron and Tesoro.

In the Scoping Memo and Ruling of Assigned Commissioner, issued on April 27, 2009, it was noted that the Independent Shippers' complaint cases were preliminarily classified as adjudicatory. All parties agreed that the *ex parte* rules and decisional timetables appropriate to a ratesetting proceeding should apply to the consolidated proceeding, and, that the refund claims would be addressed

[10] *See* Declaration of Dennis Dominic in Support of Reply Brief of Valero Marketing and Supply Company on Rehearing, paragraphs 4-11 and Attachment 1, Exhibit C.

within the rate case. In setting the scope of the issues, the assigned Commissioner defined the "past period" during which the alleged unreasonable charges were at issue as being "from April 1, 2005 through the effective date of SPBPC's approved tariffs." Therefore, the joint motion to consolidate the proceedings, and the Scoping Memo, made it clear that all parties and the Commission understood that April 1, 2005, was the earliest date from which refunds could be sought.

In this decision, we rely on the same facts and findings as we did in D.10-11-010, issued on November 19, 2010. There, we denied SPBPC's application to charge market-based rates for transporting crude oil over the Pipeline, because the Pipeline had, since April 1, 2005, exercised significant market power over Independent Shippers. We found that since April 1, 2005, the Pipeline has raised the price of transporting undiluted San Joaquin Valley Heavy crude (SJVH) over the Pipeline from $1.09 per barrel to $1.90 per barrel without losing any significant business from Independent Shippers. We also found that the Pipeline had discriminated against Independent Shippers, in favor of its affiliate, STUSCO, by charging STUSCO a lower transportation loss allowance than it charged Independent Shippers. (*See* D.10-11-010, Findings of Fact 20, 21 and 22, and Conclusions of Law.) This decision, in other words, found the Pipeline had abused its monopoly power over Independent Shippers in an unlawfully discriminatory manner from April 1, 2005 on an ongoing basis.

On May 26, 2011, the Commission issued D.11-05-026, which set just and reasonable rates for the Shell pipeline, now owned by SPBPC, to charge for its transportation service, and ordered Equilon and STUSCO to pay refunds to Independent Shippers for overcharges from April 1, 2005, to June 30, 2011.

2.2 Rehearing Phase of Proceeding

On July 5, 2011, SPBPC and STUSCO filed applications for rehearing of D.11-05-026. Independent Shippers filed oppositions on July 20, 2011, and submitted reports on their refund calculations on July 25, 2011. SPBPC and STUSCO then filed motions to partially stay the payment of refunds, which the Commission granted pending resolution of the rehearing applications.

On October 11, 2011, SPBPC made a refund filing setting forth its review of Independent Shippers' refund claims, which Independent Shippers accepted. On February 17, 2012, the Commission issued D.12-02-038, which denied rehearing as to every issue except the methodology for determining the refund amount due to Independent Shippers. The Commission granted limited rehearing as to the refund calculation, accepting the method argued for by SPBPC, and extended the partial stay pending the outcome of the limited rehearing.[11]

On March 19, 2012, Independent Shippers jointly filed an application for rehearing of D.12-02-038 as to the revised methodology for determining the amount of refunds. The Commission issued D.12-04-050 on April 20, 2012, which granted limited rehearing of the issues of the methodology and calculations of refunds. D.12-04-050 also vacated the Commission's determinations in D.11-05-026 and D.12-02-038 as to the applicable statutes of limitations for Independent Shippers' refund claims, consolidated these issues for reconsideration in this limited rehearing proceeding, and extended the stay on

[11] SPBPC and STUSCO filed a petition for writ of review of D.12-02-038 with the California Court of Appeal on March 16, 2012, as to, *inter alia*, the effective statute of limitations for any refund period earlier than July 26, 2007. That petition is pending before the Court of Appeal, as is the Court's ruling on the Commission's motion to dismiss the section of the petition related to the statute of limitations issue.

the payment of refunds pending the limited rehearing. A PHC was held on the rehearing proceeding on May 15, 2012. On May 21, 2012, SPBPC filed a rehearing application of D.12-04-050, which the Commission denied on August 3, 2012. (D.12-08-018.)

On June 7, 2012, the assigned Commissioner issued a Scoping Memo that denied SPBPC's request to stay the rehearing. The Scoping Memo also set forth the two issues to be determined on rehearing: (1) the statute of limitations to apply to Independent Shippers' refund claims (refund period), and (2) the correct methodology for calculating refunds (refund methodology). The parties served concurrent opening testimony on July 13, 2012, reply testimony on August 20, 2012, and evidentiary hearings occurred on September 20, 2012. The parties then filed opening briefs on October 15, 2012 and reply briefs on October 29, 2012, when the case was submitted.

3 Discussion

3.1 Summary of Underlying Facts and Law

Preliminarily, we think it useful to highlight some of the material facts that have been established in the record and some of the applicable laws and decisions upon which we base this decision. They are as follows:

i.) This Decision is limited to the issue of refunds and the calculation of those refunds.

Although we make references thereto, we want to make clear that in this decision, we are not revisiting our determination that Shell was subject to the Commission's jurisdiction and that it had abused its monopoly power, or that its unlawful discrimination had resulted in illegal overcharges. The decisions (D.07-07-040 and D.07-12-021) regarding the public utility status and the Commission's jurisdiction are final and unappealable. D.10-11-010 established

that the Pipeline's abuse of monopoly power resulted in the illegal overcharges that this decision orders refunded.

Today's decision relates only to the disposition of the issue of refunds and the calculation of those refunds. It determines the methodology to be used in calculating the refunds and resolves the related statute of limitations questions.

ii.) In December, 2005, Shell was put on notice of the refund claims included in all three Shippers' complaints.

In December, 2005, Shell was put on notice of the possibility that the Commission could order it to pay refunds to the Independent Shippers. It was notified of the refund claims when Chevron's complaint was filed, and joined by Tesoro. That complaint alleged that the buy/sell trading contracts Shell entered into with third parties for transportation of oil over the Pipeline were sham transactions, a subterfuge to try evade Commission jurisdiction; that from times prior to 2005, the Pipeline was being operated as a public utility; that Shell overcharged all non-affiliated Independent Shippers for services from at least April 1, 2005 and discriminated between their affiliates and non-affiliates, in violation of the Public Utilities Code. Moreover, Chevron's 2005 complaint notified Shell that the buy/sell contracts for services on the Pipeline involving Chevron, Tesoro and Valero were all at issue. The record supports all of these allegations.

The charges of discrimination and monopolistic abuse against the Pipeline in Chevron's first complaint brought the utility's buy/sell contracts with Tesoro and Valero into the case. They were the other two unaffiliated Pipeline customers that were allegedly being subjected to discriminatory treatment by the utility, and an inquiry into the utility's treatment of them would be material to us deciding whether the Pipeline was discriminating against its non-affiliated

customers. When the ALJ granted Tesoro's Motion to Intervene on January 17, 2006, he noted that "[s]ince material issues of law are likely to be important to this case, the Commission is likely to benefit from briefing of these issues by multiple parties."[12]

iii.) The effect of our bifurcation ruling was to temporarily deprive the Shippers of a forum in which to pursue their refund claims. Accordingly, the statute of limitations was tolled pending the exhaustion of Shell's jurisdictional challenges.

The fundamental impediment in SPBPC's arguments against tolling of the statute of limitations is that despite all of its statements agreeing to a stay of the refund claims, it assumes that when we entered that ruling we did not intend to preserve the shippers' right to claim refunds. SPBPC is wrong. In the exercise of our discretion, we stayed the investigation of the Independent Shippers' refund claims pending the outcome of the first phase of the proceeding, the purpose of which was to investigate our jurisdictional authority to regulate the Pipeline. Suspending consideration of the refund claims was therefore beneficial to the parties and to the judicial process. Due process demanded it. Without jurisdiction, investigating the refund claims would have been unfair to the Pipeline, would have exceeded our authority, and would have been a burdensome waste of resources.

As stated above, all parties, and Shell in particular, understood that investigation of the refund claims would accordingly be delayed until Shell filed

[12] ALJ's ruling Granting Petition to Intervene at 1 (January 17, 2006).

a ratesetting application.[13] Shell demonstrated this understanding when it asserted in its Answer to Chevron's March 2008 complaint that the complaint was "premature" because "there is no reason to revisit the issues raised by Chevron prior to the Court of Appeal addressing Equilon's pending petition."[14] Shell's substantive position, in other words, was that examination of the refund claims should not begin until its court challenges were exhausted. Answers in civil litigation and Commission proceedings are intended to "fully advise the complainant and the Commission of the nature of the defense." (See Rule 4.4, Cal. Code Regs., tit. 20, § 4.4.) We also take note that in its Answer to Chevron's complaint, it did not plead a statute of limitations defense. We view Shell's Answer and its other statements of record as compelling evidence that it knew and intended that the refund claims would not to be considered until Phase 1 was exhausted. That is also what we intended.

Shell therefore was an advocate, benefactor and cause of the delay. In 2008, when it came to the issue of when the Independent Shippers could file their refund complaints, Shell relied on our due-process-driven bifurcation ruling to advocate delay in considering these "premature" refund claims. It benefitted from the delay because it continued to profit from its unlawful and discriminatory practices while the jurisdictional issue remained unresolved. It is still profiting that delay, eight years later. Shell also caused the delay because it refused to submit to Commission jurisdiction, took every legal opportunity to

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[13] *See* RT PHC at 5, 6, 12, 15-16, in C.05-12-004, and discussion above.

[14] *See* Answer of Equilon Enterprises LLC, Doing Business as Shell Oil Products US, and Shell Trading (US) Company to Complaint of Chevron Products Company, (filed May 9, 2008.) at 8, footnote 6, and paragraph 15, at 4.

prolong a final ruling on that issue, and only filed its ratesetting application fifteen months after we ordered it to do so. Yet SPBPC now argues that the Shippers' complaints were filed too late. Its arguments ignore Shell's prior position and the effect our bifurcation ruling had in tolling the statute of limitations. SPBPC would have us deny the Independent Shippers the right to rely on the bifurcation delay as a tolling factor, but we cannot provide the benefits of due process to one party, and then deny opposing parties the right to rely on that same process.

Our decision to stay consideration of refunds until after establishing our jurisdiction is the core distinction between this case and the authorities cited by SPBPC against tolling. As we will discuss below, the facts of this case also strongly compel an equitable tolling solution, but the bifurcation of the proceedings to consider the jurisdictional issues first significantly distinguishes it from any of SPBPC's cited authorities. This appears to be a case of first impression. The totality of the facts appears to be unique, and since none of the cases SPBPC cites against tolling involve similar circumstances, we find them unpersuasive.

iv.) The only material issue considered in D.07-07-040 was whether the Pipeline was a public utility, and all refund issues were beyond its scope.

SPBPC's statute of limitations arguments are grounded on the incorrect assumption that Chevron's and Tesoro's 2005 complaint has no legal significance or relevance in this case. All of its limitations calculations are measured from Chevron's March 2008 complaint filing. It argues that tolling of the limitations period by Chevron's initial 2005 complaint is barred because the Commission closed the proceeding in which the complaint was filed and it is not an issue in

this proceeding.[15] It also presents as authority a case that has no rational relation to the facts before us.[16] We reject these arguments.

As we have made clear above, when we bifurcated the 2005 complaint case, we limited the first phase to jurisdictional issues, so closing it only meant that our examination of public utility status was complete. Everyone, including Shell, understood that the complaints, specifically the refund claims, would be part of a future ratesetting application if one was necessary. Therefore, we had no need to make findings of fact or conclusions of law about the refund issues in the jurisdictional decision.

v.) Because the Pipeline was a public utility as of 1996, the Commission has jurisdiction to issue refunds from April 1, 2005.

SPBPC argues that the refund period with respect to each complainant should be measured from July 26, 2007, the date it maintains it dedicated its facilities to public use by virtue of D.07-07-040. As we have consistently concluded, this argument has no merit, but rather is an improper collateral attack on our prior decisions and the law of this case, which is that this Commission has had jurisdiction to regulate the Pipeline's public utility services since 1996, because it dedicated its facilities to public use since that time. (*See* D.07-07-040, D.07-12-021, D.11-05-026, and D.12-02-038.) Accordingly, we reject SPBPC's argument, because the Pipeline has operated as a public utility subject to our jurisdiction throughout the period over which the Independent Shippers

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[15] SPBPC Concurrent Reply Brief at 12.

[16] *Id. See* State of California, Dept. of the CHP v. Industrial Accident Comm'n (1961) 195 Cal. Ap.2d 765, 769.

have proven they were subjected to discriminatory treatment by the Pipeline, 2005 through 2011.

In D.12-02-038, for purposes of clarity, we modified D.11-05-026 to add a finding of fact and two conclusions of law relating to our jurisdiction to impose refunds on SPBPC from April 1, 2005 through July, 2011. We found that April 1, 2005 is a reasonable start date for measuring the amount of refunds,[17] that D.07-07-040 and D.07-12-021 had already established that SPBPC, as a successor to Equilon, became a public utility before 2005,[18] and that the Pipeline has been dedicated to public use since 1996.[19] That is the law of this case. Following D.07-07-040, D.07-12-021, D.11-05-026 and D.12-02-038, we reiterate that the record evidence and the law support our conclusion that we have the authority in this case to impose refund liability on Shell for its unlawful overcharges from April 1, 2005.

vi.) We need not consider SPBPC's arguments against equitable tolling.

SPBPC presents three primary arguments against equitably tolling the statute of limitation for Tesoro and Valero. SPBPC states these shippers are not entitled to equitable tolling based on Chevron's initial complaint because 1) it is impermissible to toll a plaintiff's claim based upon an earlier filing by an independent party; 2) equitable tolling cannot be used to extend the period of damages to which a particular party is entitled but only to save a cause of action

[17] D.12-02-038, FOF No. 19.

[18] D.12-02-038, COL No. 10.

[19] D.12-02-038, COL No. 11.

from "technical forfeiture;" and 3) that equitable tolling is not permissible under Public Utilities Code Section 735.

We need not address these arguments because we have tolled the statute of limitations based on our constitutional and statutory authority to do so, as we discuss in Section 3.3, below. Since all the shippers filed their complaints within the extended limitation period, SPBPC's arguments against equitable tolling are irrelevant.

In short, SPBPC does not acknowledge the legal effect that our bifurcation had on tolling the statute. "It is well recognized that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." (*See* 3 Witkin Cal. Proc. Actions § 730 (2010).) That is precisely the situation in this case and under the relevant law, bifurcating the action tolled the statute of limitations for all three Independent Shippers until the jurisdictional issue was finally resolved.

3.2 The Refund Period for All Shippers Begins April 1, 2005

All Independent Shippers ask for refunds starting on April 1, 2005. In D.11-05-026 and D.12-02-038 we found that Shell charged unjust and unreasonable rates since at least April 1, 2005. This starting date for refunds is supported by the record, and represents the accrual date that began the running of the statute of limitations period for all three shippers' refund claims. The remaining question is whether all three Independent Shippers' refund periods date back to April 1, 2005. They do.

As we have discussed above, our jurisdiction over the Pipeline was disputed by Shell in litigation that began December 5, 2005 and ended August 20, 2008, when the California Supreme Court denied Shell's petition for

review. Because we withheld consideration of the refund issues until SPBPC's ratesetting application, and for other equitable reasons we discuss below, the statute of limitations was tolled for that entire period, with the result that, whether one applies the Section 735 two-year or a Section 736 three-year statute of limitations, all three Independent Shipper claims were filed before the running of the statute of limitations period.

Until August 20, 2008, Shell continued to evade and delay these proceedings, including consideration of the Independent Shippers' refund complaints.[20] Moreover, it refused to follow our order for it to file an application for approval of tariffs until one month after the Supreme Court's denial of review, and to this day, Shell still collaterally attacks our jurisdiction over the Pipeline from April 2005 with theories that have no merit. It was Shell, rather than this Commission or any of the Independent Shippers, that was responsible for the protracted delay in our consideration of the refund claims. To now argue, as SPBPC does, that the Independent Shippers are not entitled to tolling of the statute of limitations for that thirty-two month judicial review period is unsound and we reject it.

Given that the limitations period stopped running after nine months, and remained tolled for the next thirty-two months, the Independent Shippers, in order to get refunds back to April 2005, had until March 2010 to meet a two-year statute of limitations. All Independent Shippers filed their claims within that

[20] *See* Answer of Equilon Enterprises LLC, Doing Business as Shell Oil Products US, and Shell Trading (US) Company to Complaint of Chevron Products Company, 8, (filed May 9, 2008.)

time. Consequently, they are all entitled to refunds from the date their claims accrued, April 1, 2005.

3.3 The California Constitution and Public Utilities Code Provide the Commission with Broad Authority to Toll the Statute of Limitations in this Case

The Commission has broad authority under California law to set April 1, 2005 as the start date for each of the Independent Shippers' refund claims. We may do so for at least two reasons.[21] First, we had the constitutional and statutory authority to bifurcate the complaint proceeding and order SPBPC to file an application for a ratemaking proceeding. (*See* Cal. Const., art. XII, §§ 5 and 6; *see also*, Pub. Util. Code, § 701.) As a result of this bifurcation, the time it took to establish our jurisdiction over the Pipeline effectively tolled the statute of limitations. Second, we may also use our powers to apply equitable principles to toll the statute of limitations as it relates to each shipper's complaints, even though they filed their second series of complaints more than two calendar years after their causes of action accrued. SPBPC contends that we do not have such power.[22] We disagree.

As the courts have noted, the Commission "is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers." (*Wise v. Pacific Gas & Electric Company* (1999) 77 Cal.App.4th 287, 300; *see also*, *Southern California Edison Company v. Public Utilities Commission*, *supra*, 85 Cal.App.4th 1086, 1096.) The California Constitution and the Public

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[21] There are other reasons supporting the tolling of the statute of limitations, e.g. waiver and estoppel.

[22] Concurrent Reply Brief of SPBPC at 6.

Utilities Code confer broad authority to the Commission to regulate public utilities, including pipeline corporations such as SPBPC. (*See* generally, Cal. Const., art. XII, §§ 5 & 6; Pub. Util. Code, §§ 228 (pipeline corporation), 227 (oil pipelines), 216 (public utilities) and 211 (common carriers).) This includes "the power to fix rates … award reparation, and establish its own procedures." (*Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 905 (*Consumers Lobby*), citing Cal. Const., art. XII, §§ 2, 4, 6). Furthermore, under Section 701, the Commission "May supervise and regulate every public utility in the State and may do all things, whether specifically designated . . . , which are necessary and convenient in the exercise of such power and jurisdiction." (Pub. Util. Code, § 701.) Likewise, no court can limit this constitutional guarantee.

Furthermore, in *Sale v. Railroad Com. of California*, (1940) 15 Cal. 2d 612, 617, the California Supreme Court held:

> [The commission] is an active instrument of government charged with the duty of supervising and regulating public utility services and rates. Cal. Const. art. XII, §§ 22, 23. The Constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries. All hearings, investigations and proceedings are governed by the provisions of the act and by rules of practice and procedure adopted by the commission. No informality shall invalidate any order, decision, Rule or regulation made. Section 53 of the Public Utilities Act. Hence, unless the act requires the commission to proceed in a certain way, the only limitation upon its procedural powers is its duty to provide a

> fair hearing to any party whose constitutional rights may be affected by a proposed order." (Emphasis added.)

In short, for reasons of administrative practicality, responding to the parties' requests, and to ensure due process, we exercised our authority to bifurcate the proceedings into two phases, the second one being entirely dependent on the outcome of the first, and to order the filing of a ratemaking application. Based on the above discussion, we find that the bifurcation logically and reasonably resulted in the tolling of the statute of limitations while we and the appellate courts investigated whether the Shell Pipeline was subject to our jurisdiction.

SPBPC argues that we do not have the power to apply equity to toll the statute because doing so is equivalent to the creation of new remedies and our quasi-judicial power is limited to ordering reparations.[23] But SPBPC's characterization of our actions in this case is simply wrong. We created no new remedies. Although our determination of the refunds is made within an application process that is quasi-legislative, they are ordered as part of the adjudication of the consolidated complaints and to remedy the unlawful discrimination committed by Shell beginning April 1, 2005. In Phase 2, we exercised both our quasi-legislative (ratesetting) and quasi-judicial (refund) functions. Accordingly, our determinations regarding the refunds are of a quasi-judicial nature, and the tolling of the statute of limitations is a lawful exercise of our equitable jurisdiction. (*See Consumers Lobby, supra,* 25 Cal.3d 891, 909.)

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[23] Concurrent Reply Brief of SPBPC at 6.

The argument that the tolling of the statute of limitations here is in a ratesetting proceeding is to no avail. The situation in this particular case is out of the ordinary. We used the application process to determine what the lawful rates should have been, and ordered the refund of unlawful rates charged to the Independent Shippers based on our determination of the lawful rates. Further, despite the fact that the proceeding also fixed rates prospectively, our use of these rates to calculate the refunds that would remediate unlawful past conduct does not constitute "fixing rates," and does not make the refund determinations through the "application" process quasi-legislative. In other words, the refunds are of a quasi-judicial nature, and the exercise of our equitable authority to toll the statute of limitation is proper.

In addition, SPBPC's reliance on *Consumers Lobby* in support of the argument that we cannot toll the statute of limitations lacks merit. That case does not prevent the Commission from tolling the statute of limitations in this case. Instead, it confirmed that the Commission can apply equity in quasi-judicial reparations cases. (*Consumers Lobby*, *supra*, 25 Cal.3d at 906-907.)

We also reject as inapposite SPBPC's other argument that Section 701 does not grant us unfettered authority to create ad hoc limitations periods in direct contravention of statutory and decisional law.[24] There is no basis for that argument in this proceeding. First, SPBPC argues that it was legally not a common carrier under our jurisdiction until D.07-07-040 was issued, and therefore adopting our Section 701 powers would mean we would be imposing

[24] *Id*. at 6-7.

our jurisdiction unlawfully. We have long ago established that is not the case, as we have had jurisdiction over the Pipeline since 1996.

Second, SPBPC claims that there is no language in Section 735 that tolls the two-year statute of limitations.[25] This argument ignores our constitutional and statutory powers, or the possibility that interpreting Section 735 to deny tolling under any circumstances may abridge that power. We see no law that would preclude us from exercising our broad powers to toll the statute of limitations in these circumstances. (*See Consumers Lobby*, *supra*, 25 Cal.3d at p. 906.) We are similarly unpersuaded by the argument that because Section 736 has an explicit tolling provision, and Section 735 does not, that this evinces an intent by the legislature, by negative implication, to deny us the power to toll the statute of limitations under the Constitution and Section 701 given the facts of this case.

Mindful of the holding in *Assembly v. Public Utils. Com,* 12 Cal. 4th 87, we are unaware of any express legislative directives to this Commission that prohibit us from tolling the limitations statute under circumstances where the tolling event is our constitutionally authorized suspension of a proceeding. Nor can we find any statutory or case law restrictions upon our power to do so in this instance, including Section 735.

SPBPC's argument interprets Section 735 as prohibiting tolling under any circumstances, and writes equity out of the law altogether. It does not consider the facts of this case, or how the Commission is supposed to handle a similar situation without denying parties due process. The way SPBPC interprets

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[25] *Id*. Section 735: "All complaints for damages resulting from a violation of any of the provisions of this part, except for Sections 494 and 532, shall…be filed with the commission…within two years from the time the cause of action accrues, and not after."

Section 735 would curtail our constitutional grant to determine what procedures to use. By arguing that we have no authority to toll the limitations statute in this situation, SPBPC would have us, for example, forfeit the ability to suspend proceedings in the future. It would create an incentive for other utilities to do as Shell did here, to protract the underlying proceeding long enough to exhaust the statute of limitations, thereby denying its customers the right to file suit. It would also eliminate our ability to establish procedures for considering a complaint, application, or any other type of proceeding. We are confident the Legislature had no such intent when it drafted Section 735, and SPBPC has not provided any support to the contrary.

Furthermore, in California it "is established that the running of a statute of limitations May be suspended by causes not mentioned in the statute itself," (*Bollinger v. National Fire Ins. Co.*, (1944) 25 Cal.2d 399, at 411) and the tolling remedy "is a general equitable one which operates independently of the literal wording of the Code of Civil Procedure." (*Addison v. State of California* (1978) 21 Cal.3d 313, 320-321.) Equally, we believe that exercising our constitutional and statutory powers in this instance should operate independently of the literal wording of Section 735. To do otherwise would lead to an absurd result. "Words should not be read into a statute that are not there." (*Utility Consumer Action Network v. Public Util. Commission* (2004) 120 Cal.App.4th 644, 658.)

3.4 Under Our Broad Authority, We Have Discretion to Apply Equitable Tolling to Achieve the Purposes of the Public Utilities Code

Having established that we have the constitutional and statutory authority to toll the statute of limitations in this instance, we look to the principles and rationale behind the doctrine known as "judicial equitable tolling" as further justification for our conclusion. We find that application of this doctrine to the

facts of this case also warrants the tolling of the statute of limitations for all shippers.

We have applied equitable considerations to toll the statute of limitations in a variety of proceedings involving electric and telecommunications utilities, where declining to do so would result in unfairness to a party. (*See In re MCI WORLDCOM, Inc. and Sprint Corp.*, [D.02-07-030, at p. 34 (slip op.)] 2002 Cal. PUC LEXIS 438 at *47 ["We feel justified in invoking the broad powers granted us in § 701, to do all things necessary and convenient in the exercise of our jurisdiction to supervise and regulate public utilities."].) We have also tolled statutes of limitations "[w]henever the commission institutes an investigation." (*Investigation of All Counties Express, Inc.*, [D.90-11-032] 1990 Cal. PUC LEXIS 1016, *1 ["the institution of investigation by the commission shall toll the three-year period specified in this Section until the commission has rendered its initial decision on the matter"]); *Application of PG&E Co.*, [D.07-09-041, at 24-25], 2007 Cal. PUC LEXIS 448, *38 (holding that the decision not to apply a statute of limitations where the Commission had conducted its own investigation was "the right outcome from a fairness standpoint because it provides a remedy *to all customers who were adversely impacted* by PG&E's backbilling and collection practices during the investigation period." (emphasis added)); *Pacific Bell v. AT&T Communications*, [D.99-08-015] 1 Cal.P.U.C.3d 668, 672] 1999 Cal. PUC LEXIS 517 (statute of limitations tolled "for any claim that Pacific May have for monies found by the arbitrator to be owed to Pacific and withheld by AT&T); *In Re MCI WorldCom*, *supra*, [D.02-07-030 at 3] 2002 Cal. PUC LEXIS at *3 (tolling limitations in other actions against the applicant pending the outcome of a civil case involving three interveners. Here, the pending action was in the very same forum as the second action, making tolling even more compelling.) The

Commission has the same authority under the California Constitution and Public Utilities Code, including Section 701, to toll the statute of limitations in this case. There is no statutory provision prohibiting the exercise of this authority, and SPBPC does not cite to any law establishing otherwise.

Equitable tolling is "a judge-made doctrine which operates independently of the literal wording of the Code of Civil Procedure to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) Courts evaluate three factors to determine whether tolling is equitable: "(1) timely notice to defendants in filing the first claim; (2) lack of prejudice to defendants in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by plaintiffs in filing the second claim." (*Downs v. DWP of Los Angeles* (1997) 58 Cal.App.4th 1093, 1100 [holding the statute of limitations was equitably tolled where the second action "was based on the identical facts and charges" as the first action]; *see also Collier v. City of Pasadena* (1983) 142 Cal.App.3d 971, 924; *Addison*, *supra*, 21 Cal.3d at 319.) All three factors were certainly satisfied as to all three shippers.

3.4.1 There was Timely Notice

One common theme running through all the legal authorities that discuss equitable tolling is the principal question of whether the defendant has been put on notice of the claims. In this case, there is no dispute that Shell was put on notice of all the Independent Shippers' material claims in December, 2005. Chevron's December 2005 complaint effectively provided STUSCO and Equilon with timely notice that if the Pipeline were found to be a public utility, they would be seeking refunds from April 1, 2005 for the amount the Pipeline illegally overcharged them and all similarly situated shippers. A reading of the 2006 PHC

transcript in C.05-12-004 makes it abundantly clear that the Commission and all parties, including SPBPC's predecessors, fully understood and intended that this would be the case.[26]

Moreover, because Shell was so notified, a strict application of the statute of limitations as proposed by SPBPC is not warranted here because the record shows that the very rationale and purpose of a statute of limitations would not be served. The United States Supreme Court has held:

> Statutes of limitations are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

(3 Witkin Cal. Proc. Actions, § 408 (4th ed. 2006), quoting *Order of Railroad Telegraphers v. Railway Express Agency* (1944) 321 U.S. 342, 349.) Here, in the Phase 2 proceeding, there were no surprises, and claims were not allowed to slumber until evidence was lost. The parties presented their chosen witnesses who appeared and testified. Even Valero's claims did not become stale, and its participation in the proceeding did not alter its scope. As we discussed earlier, the 2005 Chevron complaint was replete with references to Valero's relationship as a non-affiliate shipper on the pipeline. Furthermore, it included allegations that Shell abused third-party non-affiliates via its monopolistic discrimination in favor of its affiliate. Strict application of the statute of limitations here would therefore not promote justice, and would counter the very design of such a

[26] RT: PHC at 5, 6, 12, 15-16; D.07-07-070 at 3.

statute. We find that under the facts of this case, SPBPC's right to be free of stale claims should not prevail over the Independent Shippers' right to prosecute them.

3.4.2 There was No Prejudice

In this rehearing phase, as in the underlying proceeding, SPBPC has provided no convincing argument why equitable tolling should not apply in this case. It cannot claim that it was prejudiced in its ability to gather evidence to defend against the current complaints, and it has proffered no evidence to that effect in this or the underlying proceeding. Neither has it attempted to show any prejudice from the adjudication of the refund claims in the later proceedings rather than the original proceedings. When considering tolling, we also ask whether the allegations in the later pleadings are materially different from those in the first filing so as to alter the nature of the notice given to the defendant. Again, there is no such evidence. From the beginning, Shell was aware that all the shippers' contracts were subject to our investigation, as evidenced by the allegations of discriminatory treatment by the Pipeline in favor of its affiliate and to the detriment of its non-affiliate customers. Based on the record, we find that there is no prejudice.

SPBPC argues that the current claims for refunds are for "different wrongs" than those alleged in the initial, bifurcated complaint and that the three matters are different and separate.[27] We are not persuaded. The current claims for refunds are based on identical material facts and charges as the original 2005 complaint, as Shell admitted in its Answer to the 2008 complaint. Although

[27] Concurrent Opening Brief of SPBPC at 32, 34.

there are five separate complaints covering two proceedings, and three independent complaining parties, the refund claims of all three Independent Shippers involved identical material issues and questions of law. All the complaints concerned the same pipeline and were based on the same set of facts. They were all the result of the same illegal actions by the same monopoly imposing the same discriminatory treatment on a class of similarly situated captive customers. Each complaint also involved identical time periods, and similar unjust and unreasonable overcharges. Shell would have used the same facts and witnesses, whether it were sued by one, two, or all three of the complainants.

SPBPC's "different and separate" argument does not hold up to the facts. Because we have a single set of facts, similar questions of law common to all complaints, and one institutional practice, while there may be individual questions of the amount of refunds to which each claimant is entitled, which in this case was easily resolvable, we do not see these questions as predominant over the common factual allegations and legal questions.

Consequently, since Shell suffered no prejudice in defending the refund claims because all the complaints were legally and factually similar, the invocation of our authority to toll the statute of limitations for all Independent Shippers based on the second factor is equitable and proper. Furthermore, equitable tolling applies when, as in this case, a second action is in reality a continuation of an earlier action. (*See In re Request of MCI WorldCom, Inc. and Sprint Corporation,* [D.01-05-062] (2001) Cal. PUC LEXIS 332 at *11, citing *Sierra Club, Inc. v. California Coastal Com*. (1979) 95 Cal.App.3d 495, 503-504.)

3.4.3 The Independent Shippers Exercised Good Faith

Another factor supporting our authority to equitably toll the statute of limitations is that the Independent Shippers acted reasonably and in good faith when they waited for the outcome of Shell's court challenges to the jurisdictional issue before filing their claims for refunds. More importantly, they had no other choice under our bifurcation procedure but to wait until our jurisdiction was established, as we had in effect barred consideration of their refund claims until Shell filed a ratesetting application.

In its Opening Brief in this rehearing phase, SPBPC raises the issue, for the first time in these proceedings, that Valero "slept on [its] rights" to assert its refund claims against Shell as a public utility.[28] SPBPC argues that equitable tolling is not appropriate because it requires that the plaintiff seeking the benefit of tolling must demonstrate reasonable diligence, and that neither Tesoro nor Valero offered a justification as to why they were unable to raise their claims earlier.[29] *Citing Hull v. Central Pathology Service Medical Clini*c (1994) 28 Cal.App.4th 1328, 1336, SPBPC further argues that before the Rule of equitable tolling will apply, the plaintiff must have diligently pursued his or her claim, and the fact that the plaintiff is left without a judicial forum for resolution of the claim must be attributable to forces outside the control of the plaintiff. On this score, we agree with SPBPC. However, Hull, and cases like it, favor application of equitable tolling in this case, and rejection of SPBPC's position, because our

[28] *See* SPBPC Opening Brief at 33-35.

[29] Concurrent Opening Brief of SPBPC at 33-35.

bifurcation ruling was beyond Valero's control and denied it a forum in which to pursue its refund claims until Phase 1 was completed.

There is case law in support of our conclusion. In 1897, the Supreme Court in *Williams v. Bergin*, 116 Cal. 56, 61, stated: "[a] party cannot by his own negligence, or for his own convenience, stop the running of the statute. [Citations.] The Rule rests upon the principle that the plaintiff has it in his power at all times to do the act which fixes his right of action. *The reason of the rule, however, ceases when the right of action is not under his control, but depends upon the act of another; and when the act upon which his right to maintain an action depends is an official act to be performed by a public officer in the line of his official duty, there is no presumption that any delay in its performance was unreasonable*." (Emphasis added.)

Furthermore, "the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." (*Dillon v. Board of Pension Comrs.* (1941) 18 Cal.2d 427, 431.) The cases likewise express the same concept in stating that the action does not accrue so long as the period of prevention continues. (*See Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 391-392, citing 1 Witkin, California Procedure, Actions, § 165, p. 674, *Jones v. Los Angeles*, (1963) 217 Cal.App. 2d 153, 160.)

Our bifurcation ruling was not, however, the only reason Valero did not file its complaint earlier. As we described above, in response to SPBPC's assertion that Valero slept on its rights, Valero (in its Reply Brief and the Declaration of Dennis Dominic attached thereto) revealed that there was a justifiable, credible, and good faith reason why it did not file its complaint

earlier.[30] We are referring to the "non-dedication/termination" clause, Paragraph C.20, in STUSCO's December 20, 2006 contract with Valero, that we quoted earlier in this decision. STUSCO, then a defending party in our Phase 1 proceeding used the "non-dedication/termination" clause to pressure Valero to sacrifice its right to bring suit before the Commission. By these acts, it interfered with our jurisdiction and due process. We are also cognizant of Civil Code Section 3513 that states: "Anyone may waive the advantage of a law intended solely for his own benefit, but a law established for a public reason cannot be contravened by private agreement." (*See* also, *Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 407.)

Given the unfairness of the "non-dedication/termination" clause and Valero's compliance with its provisions for more than two years, we reject SPBPC's contention that Valero slept on its rights as an inappropriate attempt to manipulate the statute of limitations defense to its benefit.

Therefore, it is apparent that one reason Valero did not file a complaint earlier was not because it was slumbering, but because it was constrained by STUSCO's "non-dedication/termination" clause. That adhesion clause threatened to terminate Valero's contract with STUSCO if it exercised its lawful rights as a public utility ratepayer to file a complaint for unlawful overcharges. In other words, it threatened to deny Valero its cause of action *in toto*. As

[30] *See* Reply Brief of Valero at 4-5. We note that Mr. Dominic, whose declaration is attached in support of the Reply Brief, testified as a witness in the earlier proceedings. His credibility was not an issue.

SPBPC itself argues, "to deny a party the ability to pursue a cause of action is a denial of due process and the injury equitable tolling was created to prevent..."[31]

We note that Valero justifiably interpreted the "non-dedication/ termination" clause as a threat by the Pipelines to retaliate against Valero if it participated in a proceeding challenging STUSCO's public utility status. Valero had good reason to believe that this was no idle threat and should be taken seriously, because, as Mr. Dominic's Declaration reveals, Shell had monopoly power, the Commission had not yet found Shell's pipeline to be a public utility, and Shell's past conduct showed that it would in fact take such steps, as it retaliated against Tesoro after it joined in the action.[32] All these reasons for not filing earlier have merit. The first two reasons are indisputable, and the third is substantiated in the record. Early on in this case, Tesoro accused Shell of manipulating its monopoly power by refusing in February 2006 to transport crude oil on a buy/sell arrangement to Tesoro's Golden Eagle refinery as retaliatory, and directed to the fact that Tesoro filed a Motion to Intervene in this proceeding in December 2005.[33] In its reply, Shell failed to rebut those

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[31] Reply of SPBPC to Opening Comments of the Independent Shippers on Proposed Decision Ordering Refunds on Rehearing, 3.

[32] *See* Declaration of Dennis Dominic in Support of Reply Brief of Valero Marketing and Supply Company on Rehearing, paragraph 10 and Attachment 1, Exhibit C.

[33] *See* Response of Tesoro Refining and Marketing Company to Equilon Enterprises LLC's Motion for Declaration Regarding Arbitration, 5, filed March 3, 2006, in C.05-12-005.

statements.[34] Accordingly, there is a factual basis upon which to believe Valero's fears were well founded.

It would be difficult to argue that Valero had any realistic control over the situation. Its choice was either to abide by the contract and have its oil transported, but sacrifice its right to claim refunds, or breach the contract and file a complaint, thereby risking losing access to the only pipeline available to it to ship SJVH crude oil to its Benicia refinery. In our view, the business consequences were sufficiently dramatic that we believe Valero was justified in delaying the filing of its complaint. To permit SPBPC to rely on a statute of limitations defense under these circumstances would reward Shell for its monopolistic abuse of its captive shipper, while providing it with an unwarranted windfall.

Accordingly, we reject SPBPC's statute of limitations defense against Valero's complaint. To accept it would be unfair. Furthermore, it would undermine our fundamental purpose: to prevent public utilities from abusing their monopoly power over their customers. It is difficult to conceive a clearer example of abuse of such monopoly power, particularly when we note that if STUSCO's strategy had worked, Shell would have saved itself more than $36 million.

Valero filed a Protest to SPBPC's Application in this proceeding on November 5, 2008, a little over four weeks after SPBPC's Application was filed, and then filed its complaint within seven months. Whether we measure the start date for tolling from the time Chevron's first complaint was filed, or from our

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[34] *See* Reply to Opposition to Motion for Declaration Regarding Arbitration, filed March 13, 2006, in C.05-12-005.

March 2006 bifurcation ruling, Valero's complaint was filed within a two-year period, and was therefore timely, no matter what statute of limitations is applied.

Valero's refunds should accordingly also be measured from April 1, 2005 as a matter of equity. Shell was put on notice in December 2005 that Valero's third-party shipper relationship was an issue in the complaint proceeding, and that their treatment of all Independent Shippers on the pipeline was a material issue in the complaint proceeding. By March 2006, there was no forum in which Valero could pursue its claims, as we had bifurcated the proceeding to first determine public utility status. One year from the filing date of Chevron's complaint, STUSCO imposed a draconian contract upon it that for all intents and purposes, prevented Valero from pursuing its claim. Shell suffered no prejudice in terms of defending itself against Valero as a result of it not filing its claim at the same time as Chevron. Once Valero filed its claim, it pursued it diligently. Given these circumstances, we believe equity and justice are served by denying SPBPC its statute of limitations defense and tolling the statute of limitations for all shippers.

Finally, we find that tolling under our constitutional and statutory authority furthers the purposes of Section 494, which, among other things, prohibits a common carrier from discriminating in the transportation of property. We have already found that Shell charged the Independent Shippers higher transportation charges and higher pipeline loss allowances as compared to the charges to its affiliate, STUSCO. It has been operating the pipeline as a public utility since at least 1996, and all three Independent Shippers suffered from these unlawful transactions from 2005. By tolling the applicable statute of limitations under Section 701, we can achieve a result consistent with Section 494—namely, that refunds dating back to April 2005 will reflect what

lawfully should have been the case: regular and uniform treatment of all customers by Shell.

Thus, under our broad constitutional and statutory authority, and the facts in this case, equitable tolling of the statute of limitations is proper because tolling was necessary for us to avoid an unfair result.

3.5 The Correct Methodology for Calculating Refunds Is the One Proposed by Independent Shippers

The respective experts differ sharply in their estimates of the total refund due. The differences derive from two sources. First, shipper witness O'Loughlin calculates the refund for the period from April 1, 2005, forward while Pipeline witness Petersen calculates the refund for the period July 27, 2007, forward. Second, while both witnesses use O'Loughlin's 2006 test year cost-of-service[35] to develop a base rate, Petersen proposes to adjust the base rate for actual volumes and the variable value of line fill based on fluctuating crude oil market prices while O'Loughlin does not.

Since we have already determined that the refund period for all Independent Shippers begins April 1, 2005, and the parties agree on the calculation of the base rate using 2006 data supplied by SPBPC, the only remaining issue is whether it is appropriate to adjust the base rate to take account of post-2006 price changes as proposed by SPBPC.

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[35] In his reply testimony at 4, SPBPC witness Petersen states that he "has been advised by counsel to accept O'Loughlin's 2006 cost-of-service to limit the number of contested issues." O'Loughlin derived the base rate from the 2006 volumes and costs provided by SPBPC. Exh. 1, O'Loughlin Opening at 8-9.

For the reasons set out below, we conclude that such changes are inappropriate and that the refund cost-of-service methodology proposed by O'Loughlin is the correct way to calculate the refund.

A fundamental principle of ratemaking is that rates once approved by the Commission and adopted by the utility remain in place until the Commission has approved new rates. The approval of new rates includes consideration of changes in the utility's revenue and cost-of-service that have occurred since the adoption of prior rates. Under SPBPC's proposal, the pipeline cost-of-service would use 2006 historical data adjusted for the actual volumes the pipeline delivered in 2007–2010 and January–June 2011. That would alter the fundamental elements of utility ratemaking. A utility must obtain Commission approval to collect rates from its customers under Sections 451 and 454.[36] When a utility files an application or advice letter to obtain such approval, the Commission determines whether the proposed rates are just and reasonable.[37] That is the utility's filed rate, which is not adjusted based on actual costs or volumes until the utility obtains Commission approval for a different rate. The entire evidentiary focus of the rate case is to develop a test year and just and reasonable rates for that time period. A regulated entity assumes the risk that

[36] Section 454 (a): "No public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified."

[37] Section 451: "All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable."

the rates it is allowed to charge will diverge from its costs, and has the opportunity to file an application later to adjust its rates accordingly.[38]

The same regulatory concepts apply to a complaint case. If a utility collects excessive charges not authorized by the Commission, a customer may file a complaint for refunds, and the Commission will then determine whether the charges are unjust and unreasonable. Under Section 734, the Commission will order refunds of unjust and unreasonable charges the utility collected from its customers.[39]

We determined that Shell exercised market power over the Independent Shippers, overcharged them for transportation of crude oil from April 2005, and owes refunds. Under regulatory principles, the refunds must be calculated based on the complaint period, which is at least since 2005. The actual volumes that the pipeline delivered thereafter have no bearing on the calculation of the referenced rate. Otherwise, SPBPC would benefit from its market manipulation, as it would receive "automatic, unrequested (at the time) rate increases that shift the burden onto Independent Shippers."[40]

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[38] Lesser and Giacchino, Fundamentals of Energy Regulation (2007), Public Utilities Reports, Inc. ("Fundamentals of Energy Regulation") at 67.

[39] Section 734: "When complaint has been made to the commission concerning any rate for any product or commodity furnished or service performed by any public utility, and the commission has found … that the public utility has charged an unreasonable, excessive, or discriminatory amount …, the commission may order that the public utility make due reparation to the complainant therefore, with interest from the date of collection if no discrimination will result from such reparation."

[40] Independent Shippers Exh. 1, O'Loughlin Opening at 6.

SPBPC mixes and matches actual throughput and monthly crude oil prices with historical expenses from 2006. That is contrary to the regulatory process, because allowing SPBPC's proposed year-to-year true-ups in the volume data would also reduce the utility's cost of capital and rate of return as well as its operating costs and, thus, its resulting cost of service. In sum, SPBPC's proposed adjustments cannot be used to develop a cost-of-service rate without changes to other cost-of-service elements. We decline to adopt this methodology as it is contrary to accepted ratemaking principles.

Furthermore, SPBPC's proposal to increase the carrying costs for line fill to reflect the monthly posted value of crude oil lacks merit. Instead, the accepted methodology is to value line fill, like "line pack" and "cushion gas" in natural gas cases, based on its original cost as a part of rate base, on which the pipeline earns a rate of return.[41] SPBPC mischaracterizes line fill as a "working inventory surcharge," indicating that the cost of line fill changes during a rate period.[42] That position is incorrect as a matter of fact. Line fill is provided once and SPBPC is entitled to carrying costs on the line fill as proposed by O'Loughlin.[43] As no data was provided by the Pipeline as to when it originally provided the line fill, O'Loughlin used the date the Commission determined was the time from which utility service was provided – 1996.[44] When the new rates were put

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[41] D.94-02-042, 53 CPUC 2d, 215, 256; 1994 Cal. PUC LEXIS 82, * 117 (treating line pack as a "rate base item" that is "included in rate base calculations").

[42] SPBPC Opening Brief, 12.

[43] RT 1711:20-1712:6 (O'Loughlin/Independent Shippers).

[44] RT 1707:7-1708:17 (O'Loughlin/Independent Shippers).

into effect in 2011, the Pipeline profited by the sale of the line fill at its then-market value when the shippers began to provide the line fill. Under SPBPC's own calculations, it sold its existing line fill on July 1, 2011 for over $100 million. SPBPC is not entitled to profit from this sale again, and as it provides no legal or factual support for its position, we reject it.

As required by Public Utility Code Section 454, a complaint-determined just and reasonable rate must remain in effect until changed by a Commission decision on rehearing or in a subsequent complaint case, Commission approval of a subsequent rate change application, or a Commission-specified procedure for rate changes (e.g., advice letter process or percentage rate increase permissible under statutory law). None of these events took place with regard to the Pipeline. Since at least 1996, the Pipeline owners had the opportunity to file a cost of service rate case application for approval of tariffs for the Pipeline, but chose to resist Commission jurisdiction and delayed filing such an application until 2008. As a consequence of this litigation strategy, Shell never filed an application to change the rates. Accordingly, application of a single refund rate based on 2006 cost of service and 2006 throughput to the entire refund period is appropriate. To adopt SPBPC's proposal to adjust the base rate for actual volumes and the variable value of line fill based on fluctuating oil market prices would in effect permit SPBPC to retroactively adjust its volumes year by year, which goes against the fundamental principles of ratemaking. We also reject SPBPC's argument that it could not have changed the rates because there were

none in existence,[45] because that would reward it for Shell's regulatory intransigence.

We turn now to the actual refund calculation employing the principles just discussed. O'Loughlin's refund testimony uses the same methodology and information from SPBPC that he used to determine the Pipeline's going-forward rate, namely, a cost-of-service refund rate of $1.2450 per barrel using a 2006 Base Year, and 2006 historical data from SPBPC from April 1, 2005, through June 30, 2011.[46] He calculates the pipeline's total cost-of-service ($66,459,777) based on the Pipeline's rate base, capital structure, cost of capital, and operating expenses for the relevant test year period. That approach uses the traditional elements of cost-of-service ratemaking, which the Commission also used to determine the going forward rate of $1.34/per barrel for the pipeline. O'Loughlin uses the same approach set forth in D.11-05-026 to calculate the amount of refunds owed. In that decision, the Commission determined that the following formula should be used to calculate refunds:

> Actual Rate Charged during the Past Period minus Just and Reasonable Rate for the Past Period times Number of Barrels shipped during the Past Period equals Refund.[47]

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[45] SPBPC Opening Brief at 8.

[46] Independent Shippers Exh. 1, O'Loughlin Opening at 2. O'Loughlin attempted to calculate a 2005 Test Year cost of service to correspond with the 2005 complaint period, but SPBPC was unwilling to provide 2005 cost of service information on the grounds that it was unrepresentative. Thus, O'Loughlin used the next nearest period in proximity, 2006, for his cost of service analysis.

[47] D.11-05-026, 2011 Cal. PUC LEXIS 280 at **19-20.

That formula remains undisputed during this proceeding. Accordingly, O'Loughlin calculates the transportation refund as the product of net barrels shipped each month and the difference between the actual location differential per net barrel and his proposed cost-of-service-based refund rate per net barrel. He uses the data on volumes shipped from monthly invoices provided by SPBPC for his refund calculations, and the same cost-of-service methodology and inputs to calculate this refund rate as he did to calculate the Commission-adopted $1.34 per barrel going-forward rate. In his calculations, O'Loughlin includes a pipeline loss allowance (PLA) amount based on the data provided by SPBPC, at 0.15% as the Commission determined in D.11-05-026.

The following table illustrates his cost-of-service calculation and the amount of refunds owed to the Independent Shippers based on an April 1, 2005, through June 30, 2011 refund period, with interest through December 31, 2012:

Refund and Interest Based on STUSCO Invoices from April 2005 Through June 2011 Using Cost-of-Service - Based Just and Reasonable (J&R) Refund Rate (With Interest through Dec. 31, 2012)

Shipper		Transportation	PLA	Transportation Interest	PLA Interest	Total
[l]		[2]	[3]	[4]	[5]	[6]
Chevron	[a]	$1 ,361,220	$131,707	$1 13,287	$10,456	$1 ,616,670
Chevron/Tesoro	[b]	$47,302,630	$4,798,270	$2,370,822	$215,896	$54,687,618
Tesoro	[c]	$l0,249,739	$1,010,101	$58,494	$5,294	$1 1,323,627
Valero	[d]	$31.948,619	$2.758.370	$1.809.582	$147,098	$36.663.669
Total	[e]	$90,862,208	$8,698,448	$4,352,184	$378,745	$l04,291,585

SPBPC's proposed refund rate, on the other hand, is based on the same rates the Commission found unjust and unreasonable in D.11-05-026.[48] It proposes that the Commission use the monthly varied rate the Pipeline charged to its marketing affiliate, STUSCO, as a base against the rate charged to the Independent Shippers to determine refunds. However, SPBPC provides no evidence or legal support for this refund rate. By its own admission, it derived the monthly varied rate charged to STUSCO from the excessive rates the Pipeline charged to the Independent Shippers.[49] This rate also disregards the cost of service, effectively proposing a market-based rate for a pipeline which the Commission found to be ineligible for market-based rates because it exercised market power by overcharging the Independent Shippers.[50] We accordingly reject SPBPC's proposed refund rate as it is calculated with a base that has been found to be the product of market manipulation and is unjust and unreasonable. Instead, we adopt the Independent Shippers' proposal which is viable, uses accepted ratemaking principles, and is based on sound analysis and undisputed data.

In summary, using SPBPC's invoice data and a just and reasonable refund rate based on the pipeline's 2006 cost-of-service, O'Loughlin calculates a total of $104.3 million in refunds, including interest (through December 31, 2012) for the April 1, 2005, to June 30, 2011, refund period. For the reasons given above, we

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[48] SPBPC Opening Brief at 2.

[49] Independent Shippers Exh. 5, Responses of San Pablo Bay Pipeline Company to Independent Shippers' Third Set of Discovery and Data Requests, SMR Rate Explanation July 30, 2012, at 5 of exhibit.

[50] Independent Shippers Exh. 2, O'Loughlin Reply at 1-12.

adopt both his methodology and his calculation of the total amount of refund due to Independent Shippers.

4 Comments on Revised Proposed Decision

Comments on the proposed decision were received from SPBPC on May 13, 2013, together with a motion requesting an Assigned Commissioner's Ruling deferring Commission consideration of the proposed decision pending Court of Appeal review or, alternatively, staying the payment obligation imposed on SPBPC by the proposed decision. Reply comments, which also addressed SPBPC's May 13 motion, were received from Independent Shippers on May 17, 2013.

The comments of SPBPC, while alleging a variety of errors in the revised proposed decision, largely re-argue positions rejected in the revised proposed decision and are accorded no additional weight.

The motion raises a new argument, which we now address. The motion is based on the following facts. In D.11-05-026, the Commission set the rates for tariffed service on the SPBPC pipeline and ordered refunds of prior period overcharges. In D.12-02-038, the Commission granted a rehearing of D.11-05-026 limited to certain issues affecting the calculation of refunds. SPBPC timely filed its petition for writ of review ("writ petition") with the California Court of Appeal, challenging the Commission's resolution of jurisdictional and statute of limitations issues in D.11-05-026 and D.12-02-038.

In response to an application for rehearing of D.12-02-038, filed by the Independent Shippers, the Commission granted in D.12-04-050 a limited rehearing of all issues affecting the calculation of the refunds and vacated the determinations in D.11-05-026 and D.12-02-038 regarding the applicable statute of limitations to be used in calculating the refunds. Today's decision disposes of

all issues as to which limited rehearing was granted in either D.12-04-050 or D.12-02-038.

When we granted limited rehearing of all issues affecting the calculation of refunds and vacated our prior statute of limitations determinations, those issues were pending before the Commission, and thus, not properly before the Court of Appeal. Consequently, SPBPC's May 13 motion to stay this proceeding until the Court of Appeal has acted on the pending writ petition has no merit. As to SPBPC's motion in the alternative to stay the payment of the refund, we find the arguments in the motion unpersuasive. For the reasons given, the motion of SPBPC will be denied in its entirety.

Today's decision supplants our prior decisions and contains our final resolution of the disputed issues. Any party aggrieved by today's decision must file an application for rehearing with the Commission before it can file a petition for writ of review with the Court of Appeal.

5 Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ.

Findings of Fact

1. As the Commission previously determined, the Pipeline has been dedicated to public use and operated as a public utility subject to Commission jurisdiction since at least 1996, in that its capacity has been provided to third parties since that date.

2. From 1996 through June 30, 2011, none of the owners of the Pipeline filed, or had in effect, any tariffs for the transportation services offered on the Pipeline.

3. The owners of the Pipeline charged the Independent Shippers unjust and unreasonable transportation rates from at least April 1, 2005 through June 30, 2011.

4. The owners of the Pipeline provided illegal preferential treatment to their affiliate, STUSCO, to the detriment of the third party Independent Shippers, by charging them higher transportation charges and higher pipeline loss allowances (PLA's) as compared to the charges to STUSCO, in the transportation of oil over the Pipeline from at least April 1, 2005 through June 30, 2011.

5. On December 5, 2005, Chevron's complaint filed in C.05-12-004, joined by Tesoro, put the owners of the Pipeline on notice that the Commission could order refunds for their overcharging all unaffiliated shippers on the pipeline from April1, 2005, including Chevron, Tesoro, and Valero.

6. The complaint made many references to Tesoro and Valero as the other Independent Shippers that constituted a "portion of the public" to whom Shell provided public utility oil transportation services during the relevant period.

7. On December 13, 2005, Tesoro filed a petition to intervene as a party to Chevron's complaint proceeding, stating that it used the pipeline at issue in the proceeding, and that the factual base of Chevron's complaint applied equally to Tesoro.

8. In C.05-12-004, all parties understood that the Commission bifurcated the proceeding into two parts: first, to determine in that proceeding if the Pipeline is or is not a public utility; second, if the Pipeline is deemed a public utility, to thereafter consider the customers refund claims in a separate "ratesetting" proceeding.

9. ALJ Walker stated at the 2006 prehearing conference that discovery regarding the ratemaking issues and competitive ratemaking should await

Phase 2, if there is a Phase 2, and that discovery in Phase 1 should be devoted exclusively to the issue of whether there is or is not a public pipeline.

10. When the ALJ granted Tesoro's Motion to Intervene on January 17, 2006, he noted that "[s]ince material issues of law are likely to be important to this case, the Commission is likely to benefit from briefing of these issues by multiple parties."

11. On March 28, 2006, a Scoping Memo and Ruling of Assigned Commissioner was issued that reflected the discussion at the PHC, namely, that Phase 1 would only concern questions of jurisdiction.

12. Shell took two substantive positions regarding the Phase 2 complaints: that the refund claims were similar to the 2005 complaint, and that they should not be revisited prior to resolution of its petition for writ of review in the appellate courts challenging the Commission's jurisdiction over the Pipeline.

13. The Commission's jurisdiction over the Pipeline was finally established when the Supreme Court denied Shell's petition for review of D.07-07-040 and D.07-12-021 on August 20, 2008.

14. On February 13, 2009, Chevron and SPBPC filed a joint motion to consolidate the Chevron 2008 complaint, C.08-03-021, into SPBPC's existing ratesetting proceeding, A.08-09-024. They agreed that the cases raised similar legal issues and much of the same evidence. All parties were in agreement that evidence presented in the rate case would be essential to determining past reasonable rates and the amounts of refunds, if any, to which shippers are entitled.

15. The complaint proceedings were consolidated with SPBPC's September 30, 2008 Application for market- based rates, to establish tariff rules, and for the transfer of the Shell Pipeline and its assets from Equilon and STUSCO to SPBPC.

16. In its Answer to Chevron's 2008 complaint, Shell did not plead a statute of limitations defense.

17. Shell was an advocate, benefactor and cause of the delay in considering the Independent Shippers' refund claims.

18. On December 20, 2006, before Valero filed a complaint on the same grounds as the other Independent Shippers, Shell modified its buy/sell agreement with Valero to include a new "non-dedication/termination" clause that threatened to terminate that agreement if Valero filed or participated in any regulatory proceeding in which Valero advocated that STUSCO or any of its affiliates are subject to federal or state regulation as a public utility or other common carrier.

19. On March 23, 2009, Valero filed a complaint in C.09-03-027 in which it made fundamentally the same allegations as Chevron and Tesoro.

20. There was no harm or prejudice to Shell in terms of gathering evidence to defend the complaints in using April 1, 2005 as the starting date for the Refund Period for each of the Independent Shippers.

21. All the complaints raised the same material factual and legal issues, and asked for the same relief, as Chevron's 2005 complaint. There is no significant factual distinction, and no legal distinction between the refund claims of Tesoro, Valero and Chevron. All three shippers were subject to the same illegal and discriminatory transportation overcharges for the same period of years.

22. Our bifurcation ruling temporarily deprived the Independent Shippers of a forum in which to pursue their refund claims until SPBPC filed its ratesetting application.

23. The evidence demonstrates that Valero did not sleep on its rights, and did not file its complaint earlier as a result of our bifurcation ruling and because its

hands were tied by contractual provisions mandated by STUSCO for Valero to obtain service on the Pipeline.

24. Valero filed a Protest to SPBPC's Application in this proceeding on November 5, 2008, a little over four weeks after SPBPC's Application was filed, and then filed its complaint within seven months.

25. Shell was put on notice of all the Independent Shippers' material allegations in December, 2005; it suffered no prejudice in terms of defending their refund complaints in Phase 2; and the Independent Shippers exercised good faith in waiting to file their refund complaints until after SPBPC filed its ratesetting application.

26. Since April 1, 2005, the owners of the Pipeline had a monopoly on the transportation of heavy crude oil from the San Joaquin Valley to the San Francisco Bay Area, and exercised significant market power over the Independent Shippers.

27. The refund period properly begins on April 1, 2005, when the Pipeline charged unjust and unreasonable discriminatory rates to the Independent Shippers.

28. During the proceeding, the Independent Shippers submitted testimony of an expert witness, Matthew O'Loughlin, fully supporting a cost of service rate of $1.2450/bbl for the Refund Period as the basis for determining refunds.

29. O'Loughlin used that rate to calculate refunds for each Independent Shipper by month from April 2005 through June 2011.

30. O'Loughlin used the pipeline's historical data and the same basic cost-of-service methodology that the Commission adopted in D.11-05-026 for the going-forward rate to calculate his $1.2450/bbl just and reasonable refund rate.

31. O'Loughlin calculated the transportation refund as the product of net barrels shipped each month and the difference between the actual location differential per net barrel and his proposed cost-of-service refund rate per net barrel.

32. O'Loughlin used the data on volumes shipped from monthly invoices provided by SPBPC for his refund calculations, and the same cost-of-service methodology and inputs to calculate this refund rate as he did to calculate the Commission-adopted $1.34/bbl going-forward rate.

33. In his calculations, O'Loughlin included a PLA amount based on the data provided by SPBPC, at 0.15% as the Commission determined in D.11-05-026. O'Loughlin also calculated interest separately on each month's refunds through December 331, 2012.

34. The 2006 cost-of-service base rate is uncontroverted.

35. The monthly variable rate that the pipeline charged to STUSCO is based on the unjust and unreasonable rates the Pipeline charged the Independent Shippers.

36. When the new rates were put into effect in 2011, the Pipeline profited by the sale of the line fill at its then market value when the shippers began to provide the line fill.

37. Since at least 1996, the Pipeline owners had the opportunity to file a cost of service rate case application for approval of tariffs for the Pipeline, but chose to resist Commission jurisdiction and delayed filing such an application until 2008.

Conclusions of Law

1. D.07-07-040 and D.07-12-021 established that the owners of the 20" heated crude oil pipeline from the San Joaquin Valley to the San Francisco Bay area

operated the Pipeline as a public utility subject to the Commission's jurisdiction and dedicated its facilities to public use since at least 1996.

2. In D.10-11-010 and D.11-05-026, the Commission concluded that since April 1, 2005, the owners of the Pipeline had a monopoly on the transportation of heavy crude oil from the San Joaquin Valley to the San Francisco Bay Area, and exercised significant market power over the Independent Shippers.

3. In D.11-05-026, the Commission further concluded that the Independent Shippers are entitled to refunds on the difference between just and reasonable rates and actual rates paid for transportation of crude oil on the Pipeline, plus interest at the three-month commercial paper rate.

4. The 2005 complaint for refunds filed by Chevron and joined by Tesoro asserted that the Pipeline overcharged all unaffiliated shippers since at least April 1, 2005, and put Shell on notice of all the Independent Shippers' material claims in December 2005.

5. The charges of discrimination and monopolistic abuse against the Pipeline in Chevron's first complaint materially brought the utility's buy/sell contracts with Tesoro and Valero into the case.

6. In the exercise of our discretion, we stayed the investigation of the Independent Shippers' refund claims pending the outcome of the first phase of the proceeding, the purpose of which was to investigate our jurisdictional authority to regulate the Pipeline.

7. All parties, and Shell in particular, understood that investigation of the refund claims would be delayed until Shell filed a ratesetting application.

8. Shell's substantive position was that the refund claims should not begin until its court challenges were exhausted.

9. The 2009 joint motion to consolidate the proceedings, and the Scoping Memo, made it clear that all parties and the Commission understood that April 1, 2005, was the earliest date from which refunds could be sought.

10. The Phase 2 claims for refunds are based on identical material facts and legal issues as the original 2005 complaint, as Shell admitted in its Answer to the 2008 complaint.

11. D.11-05-026 established that STUSCO and Equilon are jointly and severally liable for refunds owed to the Independent Shippers.

12. We cannot provide the benefits of due process to one party, and then deny opposing parties the right to rely on that same process.

13. A strict application of the statute of limitations as proposed by SPBPC is not warranted here because the record shows that the very rationale and purpose of a statute of limitations would not be served thereby.

14. The refund issues in this rehearing decision are adjudicatory, and not ratesetting issues, therefore we can apply equity under our quasi-judicial authority.

15. The Independent Shippers acted reasonably and in good faith when they waited for the outcome of Shell's court challenges to the jurisdictional issue before filing their claims for refunds.

16. Our bifurcation ruling was beyond Valero's control and denied it a forum in which to pursue its refund claims until Phase 1 was exhausted.

17. STUSCO's December 20, 2006 contract with Valero, forced Valero to sacrifice its right to bring suit before the Commission, thereby denying it the ability to pursue its cause of action.

18. The running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights.

19. Following D.07-07-040, D.07-12-021, D.11-05-026 and D.12-02-038, we have the authority in this case to impose refund liability on Shell for its illegitimate overcharges from April 1, 2005, and the Independent Shippers are entitled to refunds of the difference between just and reasonable rates and the actual unjust and unreasonable rates they paid for transportation of crude oil on the pipeline from April 1, 2005 through June 30, 2011, when the going-forward, just and reasonable rate that the Commission adopted in D.11-05-026 took effect, plus interest at the three month commercial paper rate.

20. The Constitution and Public Utilities Code confer broad authority on the commission to regulate utilities, including the power to fix rates, award reparation, and establish our own procedures.

21. For reasons of administrative practicality, responding to the parties' requests, and to ensure due process, the Commission lawfully bifurcated the complaint proceeding into two phases, and properly ordered the filing of a ratemaking application.

22. Our constitutional and statutory authority permitted us to bifurcate the proceedings, and thus, toll the statute of limitations during the period in which the Commission and the appellate courts investigated whether the pipeline was subject to Commission jurisdiction, from December 5, 2005 through August 20, 2008.

23. The Commission has equitable powers and can lawfully apply equitable principles to toll the statute of limitations as it relates to each shipper's complaints.

24. The statute of limitations under both Section 735 and Section 736 did not run before the Independent Shippers each independently filed their complaints,

and thus, they are all entitled to refunds from the accrual date of their refund actions, April 1, 2005.

25. Section 735 does not prohibit the Commission from exercising its equitable powers under the facts of this case.

26. Under our broad constitutional and statutory authority, equitably tolling the statute of limitations is lawful because tolling was necessary for us to avoid an unfair result, to reach a result consistent with the purposes of the Public Utilities Code, and to reasonably and efficiently bifurcate the proceedings, so that we could resolve the issue of whether we had jurisdiction over the pipeline as a public utility before dealing with the customers' requests for refunds.

27. The rejection of SPBPC's statute of limitations defense against Valero's complaint is legally justified so as to avoid any injustice and the undermining of our fundamental regulatory duties to prevent a public utility from abusing its monopoly power over its customers.

28. Shell suffered no prejudice in its ability to defend the Independent Shippers' complaints in Phase 2.

29. Equilon Enterprises LLC and Shell Trading (US) Company owe refunds to Chevron, Tesoro and Valero in the sum of $104,291,585, plus interest, measured at the three-month commercial paper rate, through the date of full payment.

30. O'Loughlin's cost-of-service methodology is consistent with traditional ratemaking principles.

31. Under basic ratemaking principles, the time period for a cost of service refund rate corresponds with the time period that the complaint was filed as to the rates collected by the utility.

32. SPBPC's proposal to adjust the base rate for actual volumes and the variable value of line fill based on fluctuating oil prices is rejected as it is contrary

to accepted ratemaking principles because it would retroactively adjust its volumes year by year.

33. SPBPC's proposal is also contrary to accepted ratemaking as the proposed true-ups in the volume data would also reduce the utlility's cost of capital and rate of return as well as its operating costs, and thus, its cost of service.

34. Under regulatory principles, the refunds must be calculated based on the complaint period, which is at least since 2005.

35. Application of a single refund rate based on 2006 cost of service and 2006 throughput to the entire refund period is appropriate.

36. SPBPC's proposal to increase the carrying costs for line fill to reflect the monthly posted value of crude oil is rejected, because the accepted methodology is to value line fill, like "line pack" and "cushion gas" in natural gas cases, based on its original cost as a part of rate base, on which the pipeline earns a rate of return.

37. Because SPBPC's proposed refund rate is calculated with a base that has been found to be the product of market manipulation, we reject it on the ground that it is unjust and unreasonable.

38. The refund rate should be calculated using 2006 actual historical data.

39. The just and reasonable refund rate is $1.2450 per barrel.

40. The pipeline loss allowance for the refund period is 0.15%.

41. The total amount including interest until December 31, 2012 due Chevron alone is $1,616,670.

42. The total amount including interest until December 31, 2012 due Chevron and Tesoro together is $54,687,618.

43. The total amount including interest until December 31, 2012 due Tesoro alone is $11,323,627.

44. The total amount including interest until December 31, 2012 due Valero alone is $36,663,339.

O R D E R

IT IS ORDERED that:

1. The statute of limitations is tolled for the period from December 5, 2005, through August 20, 2008.

2. No later than thirty (30) days from the date hereof, Equilon Enterprises, LLC and Shell Trading (US) Company and any successor in interest to either of them shall refund to Chevron Products Company, Tesoro Refining and Marketing Company, and Valero Marketing and Supply Company the sums listed in Conclusions of Law 41 through 44 above, plus interest measured from December 31, 2012, at the 3-month commercial paper rate, through the date of full payment.

3. Equilon and Shell Trading (US) Company are jointly and severally liable to pay the refunds ordered herein.

4. Notwithstanding any prior transfer of the Pipeline to San Pablo Bay Pipeline Company, Equilon and Shell Trading (US) Company shall remain responsible under our jurisdiction for the full payment of the refunds ordered herein.

5. The partial stay granted in D.11-10-019 is lifted.

6. The motion of San Pablo Bay Pipeline Corporation for an Assigned Commissioner's ruling deferring consideration of the revised proposed decision pending court of appeal review or, in the alternative, staying refund payment obligations, is denied.

7. Application 08-09-024, Case (C.) 08-03-021, C.09-02-007, and C.09-03-027 are closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

********** SERVICE LIST **********
Last Updated on 22-JAN-2013 by: AMT
A0809024 LIST
C0803021/C0902007/C0903027

********** **PARTIES** **********

Marlo A. Go
JAMES D. SQUERI
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP
505 SANSOME STREET, SUITE 900
SAN FRANCISCO CA 94111
(415) 392-7900
mgo@goodinmacbride.com
For: EQUILON ENTERPRISES LLC D/B/A SHELL OIL PRODUCTS; SAN PALO BAY PIPELINE COMPANY LLC

James D. Squeri, Esq.
GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO CA 94111
(415) 392-7900
jsqueri@goodinmacbride.com
For: Equilon Enterprises, LLC dba Shell Oil products US and San Pablo Bay Pipeline Co. LLC

David L. Huard
TARA S. KAUSHIK
MANATT, PHELPS & PHILLIPS, LLP
ONE EMBARCADERO CENTER, STE 2900
SAN FRANCISCO CA 94111-3736
(415) 291-7430
dhuard@manatt.com
For: Tesoro Refining & Marketing Company

John W. Leslie, Esq.
Attorney
MCKENNA LONG & ALDRIDGE LLP
EMAIL ONLY
EMAIL ONLY CA 00000
(619) 699-2536
jleslie@McKennaLong.Com
For: Shell Trading (US) Company

Joseph M. Malkin
JUSTIN M. ATAGON / NIKKA RAPKIN
ORRICK HERRINGTON & SUTCLIFFE LLP
THE ORRICK BUILDING
405 HOWARD STREET
SAN FRANCISCO CA 94105-2669
(415) 773-5505
JMalkin@Orrick.com

Erich Lichtblau
ORRICK, HERRINGTON & SUTCLIFFE, LLP
405 HOWARD STREET
SAN FRANCISCO CA 94105
(415) 773-5662
elichtblau@orrick.com
For: Orrick, Herrington & Sutcliffe

Michael S. Hindus
PILLSBURY WINTHROP SHAW PITTMAN LLP
PO BOX 2824 / FOUR EMBARCADERO, 22ND FL.
SAN FRANCISCO CA 94111
(415) 983-1851
michael.hindus@pillsburylaw.com
For: Valero Marketing and Supply Company

Jamie Nelson
SHELL OIL COMPANY
910 LOUISIANA STREET, ROOM 1122
HOUSTON TX 77002
For: Shell Oil Company

Joseph M. Karp
Attorney
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, STE. 3900
SAN FRANCISCO CA 94111-5894
(415) 591-1000
jkarp@winston.com
For: San Joaquin Refining Company, Inc.

********** **STATE EMPLOYEE** **********

Karl Bemesderfer
Administrative Law Judge Division
RM. 5008
505 Van Ness Avenue
San Francisco CA 94102 3298
(415) 703-1199
kjb@cpuc.ca.gov

Mitchell Shapson
Legal Division
RM. 4107
505 Van Ness Avenue
San Francisco CA 94102 3298
(415) 703-2727

For: Chevron Products Company

********** **INFORMATION ONLY** **********

James P. Mosher
AERA ENERGY, LLC
10000 MING AVENUE
BAKERSFIELD CA 93311
(661) 665-5671
jpmosher@aeraenergy.com

CALIFORNIA ENERGY MARKETS
425 DIVISADERO ST., SUITE 303
SAN FRANCISCO CA 94117
(415) 963-4439
cem@newsdata.com

Rock Zierman
CALIFORNIA INDEPENDENT PETROLEUM ASSOC.
1112 I STREET
SACRAMENTO CA 95814
(916) 447-1177
rock@cipa.org

David A. Cohen
CHEVRON USA, INC.
6101 BOLLINGER CANYON ROAD
SAN RAMON CA 94583-2324
dcoh@chevron.com

Vidhya Prabhakaran
DAVIS WRIGHT & TREMAINE LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO CA 94111
(415) 276-6568
VidhyaPrabhakaran@dwt.com

DAVIS WRIGHT TREMAINE LLP
EMAIL ONLY
EMAIL ONLY CA 00000
(415) 276-6500
dwtcpucdockets@dwt.com

Judy Pau
DAVIS WRIGHT TREMAINE LLP
EMAIL ONLY
EMAIL ONLY CA 00000-0000
(415) 276-6587
judypau@dwt.com

Cassandra Sweet
DOW JONES NEWSWIRES
EMAIL ONLY
EMAIL ONLY CA 00000
(415) 439-6468
cassandra.sweet@dowjones.com

Majid Mojibi
President
SAN JOAQUIN REFINING COMPANY, INC.
PO BOX 5576
sha@cpuc.ca.gov

Matthew A. Corcoran
GOLDSTEIN & ASSOCIATES, P. C.
1757 P STREET, N.W.
WASHINGTON DC 20036
(202) 872-8740
mcorcoran@goldstein-law.com

Michael B. Day
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP
505 SANSOME STREET, SUITE 900
SAN FRANCISCO CA 94111-3133
(415) 392-7900
mday@goodinmacbride.com

Brian T. Cragg
GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO CA 94111
(415) 392-7900
bcragg@goodinmacbride.com

Tara S. Kaushik
Attorney
MANATT, PHELPS & PHILLIPS, LLP
ONE EMBARCADERO CENTER, 30TH FLOOR
SAN FRANCISCO CA 94111
(415) 291-7409
tkaushik@manatt.com

Diana Donabedian
Attorney At Law
MCKENNA LONG & ALDRIDGE LLP
121 SPEAR STREET, SUITE 200
SAN FRANCISCO CA 94105
(415) 356-4600
dherman@mckennalong.com

Nikka N. Rapkin
ORRICK HERRINGTON & SUTCLIFFE LLP
405 HOWARD STREET
SAN FRANCISCO CA 94105
(415) 773-5569

Wesley M. Spowhn
PILLSBURY WINTHROP SHAW PITTMAN LLP
50 FREMONT STREET
SAN FRANCISCO CA 94105
(415) 983-1877
wesley.spowhn@pillsburylaw.com

BAKERSFIELD CA 93388
(661) 327-4257
majidm@sjr.com

Dennis Ramsey
Director - Oil Movements & Tariffs
SHELL CALIFORNIA PIPELINE COMPANY LLC
PO BOX 2648
HOUSTON TX 77252-2648
(713) 241-3739
dennis.ramsey@shell.com

Marcie Milner
SHELL ENERGY NORTH AMERICA
4445 EASTGATE MALL, SUITE 100
SAN DIEGO CA 92121
(858) 526-2106
marcie.milner@shell.com

Timothy Gehl
Senior Litigation Counsel
SHELL TRADING (US) COMPANY
PO BOX 2463
HOUSTON TX 77252-2463
(713) 241-2333
Tim.Gehl@shell.com

Barron W. Dowling
Assoc Gen. Counsel, Supply & Logistics
TESORO COMPANIES, INC.
19100 RIDGEWOOD PARKWAY
SAN ANTONIO TX 78259-1020
(210) 626-4415
Barron.W.Dowling@tsocorp.com

Andrew J. Dalton
VALERO SERVICES, INC.
ONE VALERO WAY
SAN ANTONIO TX 78249-1616
(210) 345-5954
andrew.dalton@valero.com

Thomas W. Solomon
Attorney At Law
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, 39TH FLOOR
SAN FRANCISCO CA 94111-5894
(415) 591-1000
tsolomon@winston.com

(END OF APPENDIX A)